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SUPREME COURT, U.S.

NO. 81-5336

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THURMAN MARTIN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

WHETHER THE TRIAL COURT COMMITTED ERROR DURING THE SENTENCING PHASE OF DEFENDANT'S FIRST DEGREE MURDER TRIAL IN INSTRUCTING THE JURY THAT IF IT WERE SATISFIED BEYOND A REASONABLE DOUBT THAT THE MURDER OF THE VICTIM WAS COMMITTED IN SUCH A MANNER AS TO BE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, THEY COULD CONSIDER THIS AS AN AGGRAVATING CIRCUMSTANCE IN DETERMINING WHETHER OR NOT TO RECOMMEND IMPOSITION OF THE DEATH PENALTY.

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October Term, 1981

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RESPONSE TO PETITION FOR
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SUPREME COURT OF NORTH CAROLINA

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules [for response to petitions filed "in forma pauperis"], the State of North Carolina responds to the petition of Thurman Martin and prays that this Court deny such petition on the basis of the facts and the authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Robeson County, North Carolina. In an opinion reported in State v. Martin, 303 N.C. 246, 278 S.E. 2d 214 (1981), the Supreme Court of North Carolina found no error and affirmed the judgment of death.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHETHER THE TRIAL COURT COMMITTED ERROR DURING THE SENTENCING PHASE OF DEFENDANT'S FIRST DEGREE MURDER TRIAL IN INSTRUCTING THE JURY THAT IF IT WERE SATISFIED BEYOND A REASONABLE DOUBT THAT THE MURDER OF THE VICTIM WAS COMMITTED IN SUCH A MANNER AS TO BE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, THEY COULD CONSIDER THIS AS AN AGGRAVATING CIRCUMSTANCE IN DETERMINING WHETHER OR NOT TO RECOMMEND IMPOSITION OF THE DEATH PENALTY.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§14-17 . . . A murder which shall be perpetrated by means of poison, lying in wait,

imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery,kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000."

§15A-2000 [See Appendix C of Petitioner's Petition for Writ of Certiorari.]

STATEMENT OF CASE

The evidence of record from the testimony of eyewitnesses shows that on the evening of her death, July 4, 1979, Peggy Lupo Martin was legally married to the defendant, but had been separated from him since August of 1978. There were two children of the marriage, over which she had custody. On January 6, 1979, witnesses were present when the defendant told Peggy Martin that he intended to kill her. (R.p. 36)* The defendant on that occasion ran her vehicle off the road with his car. On July 4, 1979, the victim ran to a neighbor's house late in the evening, complaining that someone was in her apartment. Before either the neighbor or the victim could do anything, the defendant came into the neighbor's apartment with a revolver. He immediately shot Peggy Martin twice. (R.p. 41) She slumped to her knees and the defendant ordered her to get up. Peggy Martin responded, "I can't walk. I can't move my legs." (R.p. 42) He thereafter carried and dragged her approximately 20 feet across the room. He then, according to a witness, ". . . started beating her. I think he hit her four or five times with the pistol." "He slung her against the wall, . . ." (R.p. 42) The witness further testified that he hit her "right in the face" with the pistol four or five times.

[*R.p. indicates page number of Record on Appeal where the testimony can be located.]

The defendant was heard to say, "If I kill you, you know where you're going; don't you?" (R.p. 43) Peggy Martin was heard to plead and beg for her life. Thereafter, two more shots were fired by the defendant at Peggy Martin while she was pleading for her life. She was heard to say, "Please forgive me. I'm dying. I'm dying." (R.p. 45) She also said, "Please help me. I'm dying." The defendant thereafter fired the last three shots and "clicked the gun approximately five times"; he then said, "Well, I've done it." (R.p. 45) Approximately twenty-five minutes elapsed from the time Peggy Martin first entered the neighbor's apartment seeking help until the time the defendant clicked the empty gun the last time. "In relation to the last three shots, approximately five, five to seven minutes elapsed from the last time I heard Peggy Martin make a statement until I heard the last three shots," a witness testified. (R.p. 46) A forensic pathologist testified that Peggy Martin suffered six gunshot wounds to the forehead, cheek, right ear, abdomen, middle back and right elbow. It was the opinion of the pathologist that the gunshot wounds to the forehead and right ear, which entered the skull and the brain, were both fatal and that the victim would have died instantly from either. It was also the opinion of the forensic pathologist that the gunshot wound to the middle back, which severed the spinal cord, paralyzed the victim from the navel down and rendered her unable to move the lower portion of her body. (R.pp. 72-77) Thus, it is clear from this evidence that the victim was first paralyzed from the waist down by one of the initial two shots which the defendant fired during the first phase of this twenty-minute period; thereafter, the victim was shot with a grazing wound to the cheek and a wound to the abdomen which skirted the rib cage, and a wound to the right elbow, which bullet passed through the forearm and lodged into the wrist. Of the final three shots, one bullet entered the forehead and another entered the right ear, with both causing death.

After the guilty verdict, the presentation of the defendant's evidence relevant to sentencing, and the arguments of counsel, the trial court charged the jurors concerning sentencing and presented them with several issues relating to sentencing which were answered by them as follows:

"1. Do you find beyond a reasonable doubt that the following aggravating circumstance exists?

(a) The murder of Peggie Lupo Martin was especially heinous, atrocious or cruel.

ANSWER: Yes

2. Do you find that one or more of the following mitigating circumstances exist?

(a) The murder was committed while the defendant Thurman Martin was under the influence of mental or emotional disturbance.

ANSWER: No

(b) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired.

ANSWER: No

(c) Other circumstances which the jury deems to have mitigating value.

No

3. Do you find beyond a reasonable doubt that the aggravating circumstance found by you outweighs the mitigating circumstances found by you?

ANSWER: Yes

4. Do you find beyond a reasonable doubt that the aggravating circumstance is sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes

s/ Gene O. Thomas, Jr.
Foreman

WE, THE JURY, BASED UPON THE ANSWERS TO THE ABOVE ISSUES, AND AS EVIDENCED BY THE SIGNATURE OF THE UNDERSIGNED FOREMAN OF THE JURY, UNANIMOUSLY RECOMMEND TO THE COURT THAT THE PUNISHMENT FOR THE DEFENDANT, THURMAN MARTIN, BE DEATH.

This the 14 day of February, 1980.

s/ Gene O. Thomas, Jr.
FOREMAN OF THE JURY."

(R.pp. 120-121)

The defendant appealed his conviction and sentence to the North Carolina Supreme Court. That Court found no error. A further summary of the facts can be found as set forth in the opinion of the Court in State v. Martin, 303 N.C. 246 , 278 S.E. 2d 214 (1981), a copy of which is attached to the Petition for Writ of Certiorari as Appendix B.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The defendant in his Petition raises a single legal issue concerning the constitutionality of G.S. §15A-2000, alleging that the aggravating circumstance of the commission of a capital offense in a manner which is especially heinous, atrocious or cruel lacks sufficient specificity to guide the jury in making responsible death recommendations which will assure consistency, fairness and restrained discretion. However, this legal issue raises three significant questions as applied to this case. They are as follows:

I. Is G.S. §15A-2000(e)(9) unconstitutional in that it will allow the imposition of the death penalty on the basis of the aggravating circumstance that the capital felony was "especially heinous, atrocious, or cruel," without any further language in the statute to guide jury discretion?

II. Did the charge of the trial court during phase two of the trial adequately advise and explain to the jury this aggravating circumstance such that jury discretion in recommending sentence was properly restricted and guided thereby?

III. Is the evidence of record sufficient to support the jury's finding of this aggravating circumstance upon which the sentence of death was based?

QUESTION NUMBER I

IS N.C. G.S. §15A-2000(e)(9) CONSTITUTIONAL AS WRITTEN?

This precise legal question has been raised and answered adversely to the defendant by both the United States Supreme Court and the North Carolina Supreme Court. Construing an identical provision of the Florida statutes ["especially heinous, atrocious or cruel" -- Fla. Stat. Ann. §921.141(5)(h)] as an aggravating circumstance in a capital case, the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976), found such provision to be constitutional in light of the fact that the Florida Supreme Court had carefully interpreted the precise meaning and extent of that language. In State v. Dixon, 283 So. 2d 1 (1973), the Florida Supreme Court had interpreted the intent of the legislature in the words "especially heinous, atrocious or cruel" to authorize the imposition of the death penalty, based on this factor, only under situations where the evidence showed the murder was committed in such a way as to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." [State v. Dixon, 283 So. 2d at 9; Proffitt v. Florida, 49 L. Ed. 2d at 924.] In Proffitt the Court found that this aggravating circumstance, as construed, interpreted and limited by the Florida Supreme Court in Dixon, was constitutional. The Court therefore concluded "we cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." [Proffitt v. Florida, 49 L. Ed. 2d at 925.]

The North Carolina Legislature, in seeking to enact an appropriate constitutional statute for the trial of capital

cases, enacted G.S. 15A-2000(e)(9) which adopts the identical language of the Florida statute. The North Carolina Supreme Court has adopted an identical construction of that language as that expressed by the Florida Supreme Court in State v. Dixon, supra. In State v. Goodman, 298 N.C. 1, 24, 257 S.E. 2d 569 (1979), the Court indicated the following:

> "G.S. 15A-2000(e)(9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the 'capital felony was especially heinous, atrocious, or cruel.' While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. State v. Stewart, supra; State v. Rust, supra; State v. Simants, 197 Neb. 549, 250 N.W. 2d 881, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977).
>
> The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974); see also, State v. Alford, 307 So. 2d 433 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S. Ct. 3227, 49 L. Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. State v. Rust, supra; Riley v. State, 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e)(9) will not become a 'catch all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances. Harris v. State, 237 Ga. 718, 230 S.E. 2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977).
>
> In the case before us the court instructed as follows in his discussion of G.S. 15A-2000 (e)(9):
>
> > You are instructed that the words 'especially heinous, atrocious, or cruel' means extremely or especially or particularly heinous or atrocious or cruel. You're instructed that 'heinous' means extremely wicked or shockingly evil.

> Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.
>
> We hold that this instruction is in accord with the construction of this subsection which we have adopted and that its submission to the jury was proper in light of the evidence in this case. The evidence reveals that decedent was shot several times and then cut repeatedly with a knife. Still living, he was placed in the trunk of a car where he remained for several hours. His struggle to escape from the trunk could be heard. Decedent, still in the trunk, was then driven into another county where he was taken from the car. He was placed upon the ground with his head resting upon a rock and then shot twice through the head. This murder is marked by extremely vicious brutality."

The North Carolina Supreme Court has, since Goodman, consistently interpreted and applied the provisions of G.S. §15A-2000(e)(9). In State v. Johnson, (I) 298 N.C. 47, 257 S.E. 2d 597 (1979), the Court repeated the aforesaid definition of the words "especially heinous, atrocious or cruel," indicating also that a defendant is entitled to an instruction upon his specific request "that not every murder is necessarily especially heinous, atrocious, or cruel." In State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979); State v. Johnson, (II) 298 N.C. 355, 259 S.E. 2d 752 (1979); State v. Detter, 298 N.C. 604, 260 S.E. 2d 567 (1979); State v. Jones, 299 N.C. 298, 261 S.E. 2d 860 (1980); State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286 (1980); State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981); and State v. Silhan, 302 N.C. 223, 275 S.E. 2d 450 (1981), the North Carolina Supreme Court has consistently applied and interpreted G.S. §15A-2000(e)(9) with Goodman and with Dixon. Therefore, with respect to this legal issue raised in the defendant's appeal, such issue has been answered adversely to the defendant previously and can best be summarized adversely to him by the words of Justice Exum, speaking for the North Carolina Supreme Court, in State v. Johnson, (I), 298 N.C. 47

at page 81 (1979):

> "We held in State v. Goodman, supra, 298 N.C. 1, 257 S.E. 2d 569, that the aggravating circumstance listed in G.S. 15A-2000(e)(9) was not intended to be a 'catchall' provision which can always be employed in cases where there is no evidence of other aggravating circumstances and that 'this subsection is [not] intended to apply to every homicide.' We adopted in Goodman Florida's construction of a similar provision in its death penalty statute. By interpreting its comparable section to be directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,' State v. Dickson, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), the Florida Supreme Court provided a construction which enabled the United States Supreme Court to hold that the provision, as construed, was not unconstitutionally vague or overbroad and gave sufficient 'guidance to those charged with the duty of recommending or imposing sentences in capital cases.' Proffitt v. Florida, supra, 428 U.S. at 256. The trial judge defined this aggravating circumstance precisely in accord with definitions approved by the Florida Supreme Court in Dickson, the United States Supreme Court in Proffitt, and this Court in Goodman."

Based upon the foregoing, it is the opinion of the Attorney General of North Carolina that this legal question raised by the Petitioner in this Court has been previously passed upon by this Court in a manner adverse to the Petitioner. The decision of this Court in Proffitt v. Florida, supra, has previously resolved this legal issue in favor of the constitutionality of an identical statutory provision. Therefore, the Petitioner's challenge is without merit.

QUESTION NUMBER II

DID THE TRIAL COURT CORRECTLY DEFINE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" IN ITS CHARGE TO THE JURY?

In defining to the jury the aggravating circumstance of "especially heinous, atrocious or cruel", the trial court made the following instruction to the jury:

> "Not every murder is necessarily especially heinous, atrocious or cruel, in the sense that these words are used in the statute. You are instructed that the words 'especially heinous, atrocious or cruel,' as used here,

> means extremely or especially, or particularly heinous or atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty marked by extreme violence or savagely fierce. It means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others. For a murder to have been especially heinous, especially atrocious or especially cruel, it must have been a conscienceless or pitiless crime which is unnecessarily torturous to the victim." [R.p. 111]

This is the precise definition which was upheld by the North Carolina Supreme Court in State v. Goodman, supra [298 N.C. at 25]. In addition to the definition approved in Goodman, the trial court in its charge to the jury set forth above included the additional instructions approved in State v. Johnson, supra, [298 N.C. at 81], by informing the jury that "not every murder is necessarily especially heinous, atrocious or cruel, in the sense that these words are used in the statute." The court also added the additional language approved in Johnson in its instruction that for "a murder to have been especially heinous, especially atrocious or especially cruel, it must have been a conscienceless or pitiless crime which is unnecessarily torturous to the victim." [Johnson, 298 N.C. at 81]

Therefore, it is clear that the trial court did not deviate from the definitions approved by the North Carolina Supreme Court in jury instructions defining this aggravating circumstance under G.S. §15A-2000(e)(9). This charge included the identical words and the identical definitions of this aggravating circumstance previously set forth by that Court as proper and as sufficient. Wherefore, it is the opinion of the Attorney General that the trial court's instruction to the jury was adequate and sufficient as a matter of law. This charge gave clear guidance to the jury in limiting their discretion in the recommendation of a sentence. This is the precise definition approved by the Florida Supreme Court in State v. Dixon, supra, and which was found without constitutional

infirmity in Proffitt v. Florida, supra.

QUESTION NUMBER III

IS THERE SUFFICIENT EVIDENCE OF RECORD TO SUPPORT THE JURY'S FINDING THAT THIS CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL?

The evidence of record shows that on the evening of her death, July 4, 1979, Peggy Lupo Martin was legally married to the defendant, but had been separated from him since August of 1978. There were two children of the marriage, over which she had custody. On January 6, 1979, witnesses were present when the defendant told Peggy Martin that he intended to kill her. (R.p. 36) The defendant on that occasion ran her vehicle off the road with his car. On July 4, 1979, the victim ran to a neighbor's house late in the evening, complaining that someone was in her apartment. Before either the neighbor or the victim could do anything, the defendant came into the neighbor's apartment with a revolver. He immediately shot Peggy Martin twice. (R.p. 41) She slumped to her knees and the defendant ordered her to get up. Peggy Martin responded, "I can't walk. I can't move my legs." (R.p. 42) He thereafter carried and dragged her approximately 20 feet across the room. He then, according to a witness, ". . . started beating her. I think he hit her four or five times with the pistol." "He slung her against the wall, . . ." (R.p. 42) The witness further testified that he hit her "right in the face" with the pistol four or five times. The defendant was heard to say, "If I kill you, you know where you're going; don't you?" (R.p. 43) And Peggy Martin was heard to plead and beg for her life. Thereafter, two more shots were fired by the defendant at Peggy Martin while she was pleading for her life. She was heard to say, "Please forgive me. I'm dying. I'm dying." (R.p. 45) She also said, "Please help me. I'm dying." The defendant thereafter fired the last three shots and "clicked the gun approximately five times"; he then said, "well, I've

done it." (R.p. 45) Approximately twenty-five minutes elapsed from the time Peggy Martin first entered the neighbor's apartment seeking help until the time the defendant clicked the empty gun the last time. "In relation to the last three shots, approximately five, five to seven minutes elapsed from the last time I heard Peggy Martin make a statement until I heard the last three shots," a witness testified. (R.p. 46) A forensic pathologist testified that Peggy Martin suffered six gunshot wounds to the forehead, cheek, right ear, abdomen, middle back and right elbow. It was the opinion of the pathologist that the gunshot wounds to the forehead and right ear, which entered the skull and the brain, were both fatal and that the victim would have died instantly from either. It was also the opinion of the forensic pathologist that the gunshot wound to the middle back, which severed the spinal cord, paralyzed the victim from the navel down and rendered her unable to move the lower portion of her body. (R.pp. 72-77) Thus, it is clear from this evidence that the victim was first paralyzed from the waist down by one of the initial two shots which the defendant fired during the first phase of this twenty minute period; thereafter, the victim was shot with a grazing wound to the cheek and a wound to the abdomen which skirted the rib cage, and a wound to the right elbow, which bullet passed through the forearm and lodged into the wrist. Of the final three shots, one bullet entered the forehead and another entered the right ear, with both causing death.

It is the opinion of the Attorney General that the aforesaid evidence is substantial and is clearly sufficient to show that this capital felony, as committed, was especially heinous, atrocious and cruel. The defendant intentionally inflicted great pain and suffering with a total indifference to such pain and suffering, and with either pleasure in or the intent to cause great psychological and physical pain and suffering of the victim prior to death. This act was done without conscience

and was pitiless and unusually torturous to the victim. This is precisely the conduct which is addressed by G.S. 15A-2000 (e)(9) as discussed by the North Carolina Supreme Court in State v. Goodman, supra, and subsequent cases.

In State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979), the Court held, on the issue of the sufficiency of the evidence to support a finding of the aggravating circumstance of "especially heinous, atrocious or cruel", the following: "The evidence reveals that decedent was shot several times and then cut repeatedly with a knife. Still living, he was placed in the trunk of a car where he remained for several hours. His struggle to escape from the trunk could be heard. Decedent, still in the trunk, was then driven into another county where he was taken from the car. He was placed upon the ground with his head resting upon a rock and then shot twice through the head. This murder is marked by extremely vicious brutality." [298 N.C. at 26] In State v. Johnson, (I), 298 N.C. 47, 257 S.E. 2d 597 (1979), on this issue the Court made the following observation:

> "We are satisfied that the submission of this aggravating circumstance was proper in light of the evidence. It tended to show that defendant first tried to strangle his victim to death with a fish stringer. Upon rendering her unconscious, he sexually molested her. Then, realizing she was not dead, he stabbed her to death. Defendant's actions could have been found by the jury to be 'especially heinous, atrocious or cruel' within the meaning of the statute as we have construed it." [298 N.C. at 82]

It is clear from the opinions of the North Carolina Supreme Court in State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979) and State v. Detter, 298 N.C. 604, 260 S.E. 2d 567 (1979), that these arsenic poisoning cases sufficiently showed a wealth of evidence from which the jury could infer that the killings were especially heinous, atrocious and cruel. The evidence summarized in both opinions abundantly demonstrated the great pain and suffering of the victims and the protracted agony occasioned by their poisoning. In State v. Jones, 299 N.C. 298, 261 S.E.

2d 860 (1980), that Court noted that there was sufficient evidence of record to support a finding that the killing was especially heinous, atrocious and cruel from the manner in which the victim was clubbed to death. The evidence indicated that the victim was struck two or three times with a pipe, two and one-half inches in diameter. Thereafter, as the victim lay on the ground, the defendant obtained a hatchet and placed a piece of tablecloth over the victim's head and then struck the victim in the left temple three to five times with the back side of the hatchet.

In State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286 (1980), the Court upheld a jury finding of the aggravating circumstance of especially heinous, atrocious or cruel, where the evidence showed that two young girls were attacked by the defendant with a machete, and that the young four year old victim suffered nine wounds; six of these wounds were to her head, with three to her left arm and one on her right thumb and index finger, which had been severed at the joint. The Court found the evidence sufficient in McDowell to uphold the death verdict recommended by the jury and imposed by the court in that case.

In State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981), the Court again addressed the question of the sufficiency of the evidence to support the aggravating circumstance of especially heinous, atrocious or cruel. The case involved the shooting of a grocery store operator during the course of an armed robbery and the shooting of an innocent bystander outside who was putting gas in his car at the time. The defendants were convicted and sentenced to death for the killing of the store operator, Mr. Watts, and also for the killing of the individual outside, Mr. Hodge. This Court remanded the case for a new hearing on sentence with the following observation:

> "In the Watts murder cases, the State's evidence shows that Watts, after opening his cash register in response to defendants' demands, begged for his life. Watts said, 'please don't shoot me. Go ahead and take the money.' With Watts pleading for his life

defendant Moore, according to his evidence, mercilessly shot him to death. In our view, the jury could find from these circumstances that the murder of Watts was especially heinous, atrocious or cruel. This aggravating circumstance was appropriately submitted in the Watts cases. In the Hodge cases, however, the State's evidence tends to show that defendant Oliver, as he was running from the store, shot and killed Hodge, who had pulled up to purchase gas. Although Hodge was an innocent bystander, his murder by defendant Oliver was, according to the evidence, the product of a sudden act and death apparently was instantaneous. There was no unusual infliction of pain or suffering to the victim. The shooting was undoubtedly the result of Oliver's excitement and haste in his attempt to escape from crimes he had already committed. We can find nothing in the brutality of this killing which exceeds that normally present in a case of first degree murder.

Where it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolved in favor of the defendant. When 'a person's life is at stake . . . the jury should not be instructed upon one of the [aggravating] statutory circumstances in a doubtful case.' State v. Goodman, supra, 298 N.C. at 30, 257 S.E. 2d at 588. We conclude, therefore, that the 'especially heinous' aggravating circumstance should not have been submitted in the Hodge murder cases." [Emphasis added]

In explaining this rationale in Oliver and Moore, the Court said:

"Defendants next contend that aggravating circumstance number four, i.e., that the murders were 'especially heinous, atrocious, or cruel' should not have been submitted. We conclude that this circumstance was properly submitted in the Watts, but not in the Hodge, murder case.

The meaning of this aggravating circumstance was fully considered in State v. Goodman, 298 N.C. 1, 24-26, 257 S.E. 2d 569, 585 (1979), where we said:

'While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection.'

In Goodman we adopted the Florida and Nebraska view that for this aggravating circumstance to

apply the murder must be a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim,' and we approved the following jury instruction:

> 'You are instructed that the words 'especially heinous, atrocious or cruel' means extremely or especially or particularly heinous or atrocious or cruel. You're instructed that 'heinous' means extremely wicked or shockingly evil. 'Atrocious' means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.'

We noted in Goodman that by so limiting the application of this aggravating circumstance it would not become 'a catch all provision which can always be employed in cases where there is no evidence of other aggravating circumstances.' Id. at 26, 257 S.E. 2d at 585.

Several cases have concluded that certain kinds of murders could be 'especially heinous.' In Goodman the deceased was shot several times, cut repeatedly with a knife, placed in the trunk of a car where he remained alive for several hours and where his struggles to escape could be heard by his assailants who drove him to another county, took him from the car, placed him on the ground and shot him twice through the head. We concluded this murder was 'marked by extremely vicious brutality' calling for the application, if the jury so found, of the 'heinous, atrocious, or cruel' aggravating circumstance. We held in State v. Johnson, 298 N.C. 47, 257 S.E. 2d 597 (1979) that submission of this aggravating circumstance was proper where the defendant tried to strangle his victim to death and, upon rendering her unconscious, sexually molested her when, realizing she was not dead, then stabbed her until she died. A number of decisions from other jurisdictions have had occasion to consider whether particular murders could be 'especially heinous, atrocious, or cruel' under capital sentencing statutes similar to ours. At least one court has determined that the murder of one pleading for mercy may fall within the category of an 'especially heinous' offense. Lucas v. State, 376 So. 2d 1149 (Fla. 1979)."

The most recent case in which the North Carolina Supreme Court has had the opportunity to address this issue is State v. Silhan, 302 N.C. 223, 275 S.E. 2d 450 (1981), where the Court addressed the trial judge's failure to submit the aggravating circumstance of especially heinous, atrocious and cruel.

After addressing its previous decisions and instructions in Goodman and other cases on this issue, the Court made the following statement:

> "Noting these principles and the cases in which the aggravating circumstance has been applied, we are satisfied that it could and should have been submitted in this case. The evidence tends to show that before she was murdered, Mary Jo Nancy Coates was stripped from the waist down. Her hands were tied behind her back, and her brassiere was tied around her neck. She was marched at knife point by her assailant into nearby woods where she was forced to lie on the ground. She was beaten before she was murdered. Clearly this murder constituted a 'conscienceless' and 'pitiless' crime which was 'unnecessarily torturous to the victim.' See State v. Goodman, supra. The jury could have found, had it been given the opportunity to do so, that the murder of Mary Jo Nancy Coates was especially heinous, atrocious, or cruel."

Likewise, the North Carolina Supreme Court has been quick to find error where there is too frequent a reliance on G.S. §15A-2000(e)(9) to extend a routine homicide into a capital crime. In State v. Hamlette, 302 N.C. 490, 276 S.E. 2d 338 (1981) the Court said:

> "According to the evidence in the present case, defendant, after riding around and drinking beer most of the evening, saw the victim and shot him three times from behind without any established motive and then fled. The victim lingered for twelve days and died from the gunshot wounds. This was heinous but not 'especially heinous' within the meaning of that term as used in the statute. In comparison with other capital cases we have decided, it was not unnecessarily torturous or outrageously wanton or vile. Contrast State v. Goodman, supra, and State v. Johnson, supra, with State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981). This aggravating circumstance should not have been submitted to the jury."

It is the opinion of the Attorney General, based upon the decisions of the North Carolina Supreme Court previously cited, that there was an abundance of evidence of record in this case to support the submission to the jury of this aggravating factor. It is also the opinion of the Attorney General that these decisions of the North Carolina Supreme Court previously cited have consistently interpreted and limited the meaning of G.S.

15A-2000(e)(9) in such a manner as to eliminate therefrom any ambiguity in its language. That statutory provision, as consistently interpreted by the North Carolina Supreme Court, is constitutional.

CONCLUSION

The Respondent respectfully submits that the Petitioner's Petition for Writ of Certiorari should be denied for he fails to set forth any meritorious basis upon which relief should be granted. North Carolina General Statutes §15A-2000(e)(9) is constitutional as interpreted and applied by the North Carolina Supreme Court. The Petitioner received a fair and impartial trial and was convicted upon overwhelming competent evidence. The sentence of death was imposed by a constitutionally acceptable procedure and such sentence is supported by the evidence. In this regard the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The sentence was imposed under an unambiguous statutory scheme which provides for limited and guided jury sentence recommendations which assure consistency, fairness and restrained discretion.

Respectfully submitted this the 21 day of September, 1981.

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